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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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No. —, Original

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EX PARTE THE STATE OF TEXAS, ET AL.,  
*Petitioners.*

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MEMORANDUM OF INTERVENER DIRECTING ATTENTION TO THE BRIEFS FILED IN THIS COURT ON THE FORMER APPEAL AND SHOWING HOW THE CONFISCATION ISSUE WAS PRESENTED TO THIS COURT; AND COVERING CERTAIN MATTERS BROUGHT UP IN THE ORAL ARGUMENT.

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I.

The sufficiency in law of the Company's over-all evidence to raise a fact issue for determination by the appointed triers of fact in the State Court was directly raised in this Court and of necessity decided by it in *Lone Star Gas Co. v. State*, 304 U. S. 224.

In addition to its rulings on the interstate commerce and segregation questions, the Court of Civil Appeals, upon its original consideration of this case held with reference to the evidence as a whole, that:

“At most, the evidence merely presented the difference of opinions of equally well-qualified experts”

(Record in this Court, Vol. V., p. 3363, Company's main brief in this Court, 124).

The court then held that this character of evidence, presenting as it did merely a conflict, was insufficient as a matter of law to overturn the *prima facie* presumption of validity attending the Commission's order. In this Court the Company challenged this ruling on the grounds that it denied to it an adequate judicial review. At p. 51 of the Company's main brief in this Court, the following statement appears:

"That the evidence was at least sufficient to raise an issue of fact as to whether the rate was confiscatory is shown by the statement previously submitted, *supra*, pp. 34-50. The Court of Civil Appeals held that in respect to certain vital matters affecting the issue of confiscation, including the issue as to the *fair value* of appellant's properties and the issue as to what would be a *fair rate of return*, the evidence was conflicting and at most 'merely presented the difference of opinions of equally well qualified experts.' (V., R. 3363, 3368.) The court further held that, in these circumstances, the jury had no right to resolve the conflict in the evidence and that appellant's attack on the rate order should be overruled as a matter of law. Appellant has challenged this ruling as involving a denial of adequate judicial review of the rate order."

In addition to the point thus raised, the Company presented to this Court in its main brief the following point:

"The holding of the State Court that the triers of the fact were without power to settle conflicts in the evidence denied Appellant an adequate judicial review of the rate order on the tendered issue of confiscation. It denied Appellant due process." (Point 4, page 124, of Company's main brief.)

Under this point, language and rulings of the State Court dealing with the insufficiency in law of the over-all evidence

were questioned and discussed. The argument supporting the point covers ten pages of the brief.

The Company presented the following as its Point 5:

“The finding of the jury that the rate was confiscatory is sustained by clear and satisfactory evidence. Therefore, the judgment of the Court of Civil Appeals should be reversed and that of the District Court affirmed.”

(Page 134, Company's main brief.)

Under this point the Company presented statements from the record and argument relating to “*the application of the rate considered in the light of the evidence as to appellants' integrated properties and operations.*” (Page 139, Company's main brief.) As finally ruled by this Court, this was the proper standard for measuring the sufficiency of the evidence. The Company's over-all evidence was analyzed and discussed in great detail. The argument urged that such over-all evidence was sufficient in law to raise the issue of confiscation, and thus sufficient to entitle the Company to a determination of that fact issue by the triers of fact.

It was necessary for the Company, as appellant, to demonstrate that the segregation ruling of the Court of Civil Appeals constituted *material* error. In order to show ground for reversal of the *judgment* of the Court of Civil Appeals, the Company had the burden of demonstrating that its over-all evidence was sufficient in law to raise a fact issue. Otherwise, the judgment of the Court of Civil Appeals would have been correct, without regard to the correctness of the reasons assigned in its support.

The Company had the burden of overturning the *judgment* and not merely the *reason* stated in its support. (*McClung v. Silliman*, 6 Wheat. 598, 603.) It had the burden of showing not only that the over-all evidence was entitled to consideration but, also, that when considered, it was sufficient in law to raise the fact issue submitted to

the jury under said evidence. Recognizing that it rested under this burden the Company attempted to show that the over-all evidence was sufficient in law to raise an issue of fact to be submitted to the jury and to support their finding.

The State of Texas in the main brief which it filed in this Court countered the Company's contention with reference to the sufficiency of the over-all evidence. In fact, it devoted a major portion of its briefs to the contention that the Company's over-all evidence was insufficient in law to raise a fact issue. At Page 85 of its main brief in this Court, the State presented the following general proposition:

"Appellants' evidence *as a whole* was insufficient as a matter of law to demonstrate confiscation or other deprivation of Federal constitutional right, and to overturn the presumed validity of the order." [Italics ours.]

Under this proposition, the State discussed at great length the Company's over-all evidence and contended that it was insufficient as a matter of law to raise the issue of confiscation. The State presented elaborate tabulations of figures in an effort to support its contention. In supplemental briefs the Company challenged these tables and the State's analysis of its evidence. A very substantial portion of the main briefs of both parties, *as well as their several supplemental briefs*, was devoted to that issue. (See pp. 85 to 206 of the State's main brief and the Company's Reply Brief, pp. 44 to 82, as illustrative.) At p. 99 of its main brief in this Court, the State made this statement:

"By way of prelude, we express our confidence that whether the adequacy of the rate as applied in Texas be determined *upon an over-all Texas-Oklahoma basis (as fixed by the Commission and as contended for by the Company)* or upon the basis of appellees' segregation between Texas and Oklahoma properties and oper-

ations, or even upon the basis of the entirely unacceptable purported segregation between so-called 'inter-state and intrastate' operations submitted by the Company in the District Court, the rate will not be found confiscatory upon any basis.' [Our italics.]

By the elaborate tables set forth at pp. 196 and 197, the State attempted to demonstrate the insufficiency of the Company's over-all evidence.

The Company in its "Reply Brief for Appellant", at p. 44, countered the State's criticism of its over-all evidence under this heading: "The Confiscation Issue—Discussion in Reply to Division C of Appellees' Brief, pp. 88 to 206." (Reply Brief, pp. 44-88). Here the Company pointed out that the State had failed to meet the issue raised by the Company's over-all evidence; that instead of meeting the issue, the State had simply gone over the record and selected different items of evidence and blended them to its own benefit, thus ignoring the fact that the selecting and blending of the evidence was the function of the jury.

We point to the following statements appearing in the State's "Supplemental Brief for Appellees"—we quote from p. 18 of said brief:

"It is further to be observed that the jury's verdict in this case can not be binding upon anyone, for several reasons: (1) as we have urged in many forms heretofore, the evidence *as a whole* was totally insufficient as a matter of law to support the verdict \* \* \*."

The State then complained of certain elements of and omissions in the Trial Court's charge to the jury.

We quote the following from p. 19 of said brief:

"And from the opinion of the Court of Civil Appeals (R. III, 3335, 3353, 3354, 3357, 3359-3370—especially 3369) it appears plainly that what the Court of Civil Appeals did actually hold in this case was that as a

matter of law the evidence *as a whole* did not meet the required preliminary legal test as to quantum and quality necessary to overturn the presumed validity of the Commission's order, and this was adjudged as a matter of law and not as a matter of fact." [Italics ours.]

We quote the following from p. 20 of said brief:

"As we view it, then, all questions go out of this case so far as this Court is concerned, except the two issues, (1) as to whether the order was void in whole or in part, under the Federal Commerce Clause; and (2) whether the evidence is such as to meet the requirement of being 'clear and convincing' under the well-established rule uniformly laid down and applied in the decisions of this Court, as to confiscation."

The State here plainly recognized that one of the two remaining issues before this Court was whether the evidence as a whole was sufficient in law to raise the confiscation issue.

Under the heading of "Confiscation" at pp. 21 to 24 of said brief, the State made specific criticisms of the Company's over-all evidence and stated that,

"considering the unacceptable character of the Company's evidence *as a whole* on all questions of valuation in the rate base, the evidence falls far short of being either 'clear and satisfactory' under the State rule as to unreasonableness and unjustness, or 'clear and convincing' under the well-established rule of this Court as to confiscation." (Italics ours.)

At page 22 of said brief, the State said:

"We have attempted in our original, and in this, brief to outline enough of the higher points of objection to the Company's evidence to give this Court some insight into why the State Appellate Courts were justified in rejecting the *entire* evidence, as failing to measure

up to the requirement as to quantum and character.”  
(Italics ours.)

At pp. 5 and 6 of the State’s “Second Supplemental Brief for Appellees”, the following statement was made:

“Appellant’s evidence relating to ‘*overall integrated properties and expenses*’, if material at all, would have been so only if its quantum and quality had been of a sufficiently clear, convincing and satisfactory nature—which it was not.” (Italics ours.)

When the case was submitted to this Court in oral argument at the bar, a considerable portion of the argument and of the questions propounded from the Bench related to the question of whether or not the Company’s over-all evidence was sufficient in law to raise a fact issue on the confiscation question.

We respectfully submit that the ruling by this Court that the Court of Civil Appeals had erred in holding that the Company was required to make a segregation of its property between interstate and intrastate operations could not have formed the sole basis of this Court’s judgment reversing the *judgment* of the Court of Civil Appeals which upheld the validity of the rate order in all respects. We submit that it was necessary for the Court to further determine that this ruling constituted *material* error. It seems further clear that, in so determining, it was also necessary for the Court to decide whether the ruling of the Court of Civil Appeals could be sustained upon the application of a proper standard or measure to the over-all evidence, especially in view of the petitioners’ (then appellees’) contention that the over-all evidence was insufficient in law when thus considered and measured.

The record shows that the Supreme Court of Texas, in interpreting the opinion of this Court, considered the manner in which the question at issue had been presented in the

briefs filed in this Court. (See Petition for Mandamus, p. 509, tenth line from bottom.)

When the Court of Civil Appeals considered the case the second time, it analyzed the over-all evidence and made two distinct rulings with respect to it (Petition for Mandamus, p. 116). The first ruling was that the evidence was insufficient in law to raise a fact issue. This ruling was based entirely upon the Court's construction of the applicable State statute, Article 6059. According to the Court of Civil Appeals, this statute imposed a standard of proof which made it impossible for the Company to overturn the Commission's order when such order was supported by substantial evidence.

The Court of Civil Appeals also ruled that the judgment of the District Court was so against the overwhelming weight and preponderance of the evidence as to require a reversal of the District Court's judgment in the interest of justice (p. 116). But this ruling did not form the foundation of the Court's judgment upholding the validity of the Commission's order in all respects. It did not carry this ruling into effect in the manner required by the local practice (Return of the Justices, p. 11).

Because the judgment of *rendition* made by the Court of Civil Appeals was based upon its ruling that the evidence was *legally* insufficient, the Supreme Court of Texas acquired jurisdiction over the cause; and it was this ruling and the judgment based thereon that was reversed by the Supreme Court of Texas, by applying its construction of Article 6059 (Return of Justices, p. 12).

In the very beginning of its *per curiam* opinion (Petition for Mandamus, p. 235), the Court of Civil Appeals made this statement:

"Two main contentions are urged in the argument.

"1. It is contended that since R.C.S. Art. 6059 provides for judicial review to determine whether rate

orders of the Commission are unreasonable and unjust to the complaining party, and since the trial therein provided is the same as in other civil cases, our decision upholding the Commission order on the ground that it is supported other than by conclusive evidence does violence to this article under which the proceeding was brought.

(38) Manifestly, this question, involving as it does, only the *proper construction of a state statute*, is one solely for the state courts, and contains no element which would confer jurisdiction upon the Federal courts." (Italics ours.)

The Company assigned as error in the Supreme Court of Texas the construction of the State statute adopted by the Court of Civil Appeals (Petition for Mandamus, p. 274).

The Supreme Court of Texas sustained these assignments of error and, in so doing, adopted a construction of the State statute, Article 6059, distinctly different from the construction adopted by the Court of Civil Appeals. The Supreme Court of Texas held that under the State statute, conflicting evidence was sufficient to raise a fact issue determinable by the triers of fact in the District Court.

In construing Article 6059 the State Supreme Court first states its construction of the opinion of the Court of Civil Appeals (p. 505). The Justices state that the existence of conflicting evidence was admitted (Return of Justices, p. 5). The State Supreme Court distinctly disapproved the construction of the statute adopted by the Court of Civil Appeals (Return of Justices, pp. 5 to 11, quoting from their opinion).

The Justices state in their Return that their judgment was based upon the statute, and that they would have rendered the same judgment if it had been based solely upon their construction of the statute (Return of Justices, pp. 10, 11).

If the Company had not overturned, in the Supreme Court of Texas, the construction placed upon the State

statute by the Court of Civil Appeals, it could not have prevailed. This is made plain by the fact that the Court of Civil Appeals based its ruling entirely upon its own erroneous construction of the State statute.

If it be true, as stated by the Court of Civil Appeals, that the construction of the State statute raised only a question "solely for the State courts, and contains no element which would confer jurisdiction upon the Federal courts", (p. 235, Petition for Mandamus), then the same is equally true when the opposing construction of the same statute, as announced by the State Supreme Court is applied. If the construction of Article 6059 adopted by the Court of Civil Appeals was wrong (as the State Supreme Court held), then its judgment was wrong. Under the construction of the statute adopted by the Texas Supreme Court, the judgment of the Court of Civil Appeals could not possibly be sustained.

The State Supreme Court had no occasion to discuss the evidence. That court is without power to make findings of fact on conflicting evidence. Its jurisdiction is limited to questions of law. Here the existence of a conflict in the evidence was admitted. The question presented to the State Supreme Court related not to the *existence* of the conflict but to its legal effect under Article 6059. Hence, the Texas Supreme Court discussed the statute and not the evidence.

In the course of the argument, counsel for the petitioners asserted that, accepting as correct the State Supreme Court's construction of the statute, petitioners would still be entitled to have findings made by the Court of Civil Appeals concerning the sufficiency of the evidence under that construction of the statute. Tested in the light of the settled State practice, this suggestion is erroneous.

If the case were before the Court of Civil Appeals again it could not reverse and *render*. Such a ruling would be in plain conflict with the ruling of the State Supreme Court already made and based upon its construction of Article

6059 and the admitted existence of a conflict in the evidence. As pointed out by the State Supreme Court, the Court of Civil Appeals cannot reverse and *render* in the face of conflicting evidence sustaining the finding in the District Court (Return of the Justices, pp. 11, 12). On the other hand, if the Court of Civil Appeals should *remand* on its finding of "factual insufficiency" (which it failed to do when the case was before it) then it would create the same result already created by the judgment of the State Supreme Court—a remand to the District Court for a new trial.

## II.

### Corrective Statement.

1. In response to questions propounded to him from the Bench, counsel for the petitioners during his oral argument stated in effect that the term of the Supreme Court of Texas at which the judgment in this case was rendered, expired in July 1941—at the same time expressing doubt on the point. The terms of the Supreme Court of Texas as fixed by the Constitution and laws begin on the first day of each year and end on the last day. The present term of that Court began on January 1, 1941, and will end on December 31, 1941.

2. In his oral argument, counsel for intervenor referred to the dissenting opinion of Mr. Justice Miller, in *Riggs v. Johnson County*, 6 Wall. 166. That part of the dissenting opinion here referred to begins on p. 201 and extends to p. 204.

Respectfully submitted,

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